FOR ARGUMENT

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In The Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF WASHINGTON, ET AL., APPELLANTS

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE AND MAKAH INDIAN TRIBE

STATE OF WASHINGTON, APPELLANT

v.

UNITED STATES OF AMERICA, AND CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

This appeal is from two separate judgments rendered by a three-judge district court in the Eastern District of Washington. One case, *United States of America, et al.* v. *State of Washington, et al.*, Civ. No. 3909 *(Yakima* case) was brought by the United States on behalf of the Confederated Bands and Tribes of the Yakima Nation

and its members (A. 143). The Yakima Tribe intervened as a party plaintiff (J.S. App. 47). The other case, *Confederated Bands of the Colville Indian Reservation et al.* v. *State of Washington, et al.*, Civ. No. 3868 (*Colville* case), was brought by the Confederated Bands & Tribes of the Colville Indian Reservation and the Lummi and Makah Tribes against the State of Washington and various of its officials (A. 1-2). The United States is not a party to the *Colville* case, and the present brief speaks only to the *Yakima* case.

OPINIONS BELOW

The opinion of the three-judge district court in the consolidated cases (J.S. App. 1-65) is reported at 446 F. Supp. 1339.

JURISDICTION

The judgment of the three-judge district court in the *Yakima* case (J.S. App. 71-74) was entered on May 10, 1978. The State's motion for a partial new trial was denied on July 17, 1978 (J.S. App. 79). On August 14, 1978, the State filed a notice of appeal to this Court (A. 253).

The State filed a single jurisdictional statement covering both appeals on October 13, 1978. The United States moved to dismiss the appeal in the *Yakima* case for lack of jurisdiction under 28 U.S.C. 1253, on the ground that the three-judge court was improperly convened. On February 21, 1979, this Court entered an order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits (A. 255). On the question of jurisdiction, we respectfully refer the Court to our previously filed motion to dismiss.

QUESTION PRESENTED[1]

Whether a State may impose excise and sales taxes on transactions in cigarettes occurring within an Indian Reservation between licensed tribal retailers and nonmembers when the Tribe itself is importantly involved in the enterprise and regulates and taxes such transactions for the purpose of generating governmental revenues and the effect of the State's intervention is substantially to undermine the tribal program.

STATEMENT

1. The Yakima Nation is a federally recognized Indian tribe with a governing body, the Yakima Tribal Council, which is recognized by the Secretary of the Interior (A. 171). The Tribe occupies the Yakima Indian Reservation, established by the Treaty with the Yakimas, 12 Stat. 951, and encompassing 1,387,505 acres in south-central Washington State. All but 270,895 acres are owned by the United States in trust for the Tribe, its members or other individual Indians (*id.* at 172). The total population on the Yakima Reservation is approximately 27,000, including about 5,000 members of the Tribe and some 1,500 Indians of other tribes (*ibid.*).

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[1] There remains, of course, the threshold jurisdictional question already briefed by the United States. See Motion to Dismiss filed by the United States, February 1979.

So, also in the event this Court were to reverse the district court's ruling and hold that Washington may impose its cigarette and sales taxes on Reservation transactions to non-Indians, there would remain enforcement issues—notably whether the State may seize cigarettes in the possession of Indians on trust lands within the Reservation or cigarettes en route to the Yakima Tribe destined for ultimate resale to both Indians and non-Indians. But these questions were mooted by the district court's basic holding and are not ripe for consideration on this appeal.

The State of Washington has assumed civil and criminal jurisdiction over unrestricted fee land within the Reservation pursuant to the Act of August 15, 1953, Pub. L. No. 280, 67 Stat. 588; Wash. Rev. Code Ann. §37.12.010 (West 1964). This assumption of jurisdiction does not apply, however, to Indians when on their tribal lands or allotted lands held in trust by the United States, except with respect to the following categories of matters: (1) compulsory school attendance; (2) public assistance; (3) domestic relations; (4) mental illness; (5) juvenile delinquency; (6) adoption proceedings; (7) dependent children; and (8) operation of motor vehicles upon the public streets, alleys, roads and highways. See *Washington* v. *Yakima Indian Nation*, No. 77-388 (Jan. 16, 1979).

2. The Yakima Nation owns and operates several tribal enterprises. With the exception of an Aircraft Sales, Charter and Service Enterprise, which it operates as a corporation off the Reservation and with respect to which it pays applicable state taxes, these enterprises are all operated by the Tribe on the Reservation and are wholly owned by the Tribe (A. 175–176). The surplus income is used for tribal purposes. These enterprises, moreover, provide on-reservation employment for tribal members and other Indians and non-Indians. The majority of the employees are tribal members (*id.* at 175). The tribal enterprises include a Land Enterprise, Timber Enterprise, Furniture Manufacturing Enterprise, Fish and Food Processing Enterprise, and a Newspaper Enterprise (*id.* at 176). The sales of these businesses exceed $12,000,000 annually (*ibid.*).

The Tribe also operates an enterprise which wholesales cigarettes and tobacco products to members on the Reservation. The Nation purchases cigarettes and other tobacco products from suppliers outside of the State of Washington. The cigarettes are then shipped directly to the Tribe by licensed and bonded common carriers over the public highways of the State of Washington. The Nation obtains possession of the

cigarettes at the Yakima Indian Nation Industrial park which is located entirely within the Yakima Reservation (A. 172–173). These cigarettes and tobacco products are resold and delivered to the individually owned smoke shops by tribally owned vehicles where they are sold at retail to members of the Tribe and other customers (*ibid.*). No records are kept with respect to the numbers of cartons of cigarettes or the value of tobacco products purchased by non-members of the Tribe, nor do the licensed retailers limit sales of cigarettes to non-members (*ibid.*)

All persons licensed by the Tribe to sell cigarettes and tobacco products at retail within the exterior boundaries of the Yakima Reservation are enrolled members of the Tribe. The land upon which these licensed Indian retailers conduct their retail business is land allotted to individual Indians but held in trust by the United States or otherwise restricted against alienation (A. 173). The Tribal Council has enacted a series of Tribal Ordinances to regulate and tax the sale of cigarettes and tobacco products on trust land within the Reservation. Ordinances of October 8, 1970; January 30, 1974; September 10, 1974 (J.S. App. 142–145; A. 172). All persons engaged in the business of selling cigarettes or other tobacco products on trust land must obtain a permit from the Tribe. The permittee must obtain his cigarettes from the tribal enterprise, employ only members of the Tribe, and sell at a uniform price (*ibid*). For a permit, the Tribe charges a fixed fee of $25 per year and 2.25 cents per package of cigarettes sold (*id.* at 143). In 1975, the Tribe collected $278,408.24 from the cigarette and tobacco products mark-up and tax (*id.* at 177).

The funds received by the Tribe from its cigarette, tobacco products, and sales tax, plus profits from its cigarette and tobacco products wholesaling enterprise, are available for expenditure by the Tribe in support of its governmental functions (A. 177). Some of these are financed by joint federal-tribal programs expending

both federal and tribal funds (*ibid.*). These include the basic functions of a local government, among them law enforcement, education, zoning, planning, and housing programs (A. 177–182).

3. The State of Washington has enacted several taxing schemes which are at issue in this case. The State imposes an excise tax on cigarettes in the amount of $1.60 per carton of 200 cigarettes (A. 182). Prior to 1972, the state tax was levied on articles "sold, used, consumed, handled * * * or distributed within this state," and the tax was collected from "the person who first sells, uses, consumes, handles * * * or distributes within the state." Wash. Rev. Code Ann. §82.24.080 (West 1964). A 1972 Amendment to the statute added possession as a legal incident of taxation, but exempted possession of up to two cartons of cigarettes from taxation. 1972 Wash. Ex. Sess. Laws, ch. 157, §§6 and 7. As construed by the Washington State Supreme Court in *Tonasket* v. *State*, 84 Wash. 2d 164, 525 P.2d 744 (1974), this provision permitted the Tribe to possess unstamped cigarettes for resale to its tribally licensed retailers and permitted these retailers to sell no more than two cartons of cigarettes to non-Indians without affixing excise tax stamps or collecting the cigarette excise tax (A. 183).

While this suit was pending, a 1975 Amendment repealed the two carton exemption from taxation based on possession of cigarettes. 1975 Wash. 1st Ex. Sess. Laws, ch. 22. The Tribe remains exempt from cigarette excise tax liability and may possess unstamped cigarettes for resale to its tribal members (A. 184). However, the statute requires licensed Indian retailers to collect cigarette excise taxes with respect to sales to non-members and to remit the tax to the State (*id.* at 183–184). The aggregate of taxes, both tribal and state, imposed upon the sale of cigarettes by licensed retailers of the Tribe amounts to $2.065 per carton (*id.* at 185). Assuming that all applicable cigarette and sales taxes are in fact collected, the parties estimated in 1977 that

the average selling price of a carton of cigarettes sold by a tribal retailer to a non-member would be $5.79 per carton; the average selling price of a carton of cigarettes sold by a tribal retailer to a member of the Tribe would be $3.95 per carton; the average selling price of a carton of cigarettes sold off the Reservation by non-Indian retailers would be $5.00 per carton (*id.* at 185–186). The deposition of Cyril C. Hermann (*id.* at 219–246) establishes that the price differential caused by the imposition of both state and tribal taxes is sufficient to preclude sales by tribal retailers to non-Indians.

The state retail sales tax applies to each retail sale, including cigarette sales, within the State unless constitutionally prohibited.[2] Wash. Rev. Code Ann. §82.08.020 (West 1964) (J.S. App. 106). The tax is imposed upon the buyer, and is collected by the seller. Wash. Rev. Code Ann. §82.08.050 (West 1964). If, however, the seller fails to collect the tax, he is personally liable to the State for the omitted tax (*ibid.*). Until 1974, sales by Indian retailers on the Reservation were exempted from the sales tax collection requirement.

On August 23, 1974, the State, through an emergency provision, amended its regulations pertaining to the state sales tax (A. 183–184). The amendment removed the tribal retailers' exemption from sales tax collection responsibility on sales to non-Indians. The State mailed notices to the individual Indian retailers detailing this change and enclosing forms which were required to be completed and returned to the State within thirty days. The notices threatened that failure to comply with the registration and reporting requirements on retail sales would expose the individual licensed Indian retailers to such enforcement provisions as Washington law prescribed (*id.* at 183–184).

On November 12, 1976, effective a month later, the State further amended its regulations pertaining to

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[2] The state does not attempt to extend its sales tax to sales from the Tribe's Timber and Land Enterprises (A. 176).

state cigarette and sales taxes on sales by licensed Indian retailers of the Tribe to non-members (A. 184). That regulation, WAC 458-12-193, among other things, requires tribal retailers to collect and remit state sales and cigarette taxes on sales of cigarettes to non-members. On November 24, 1976, the State issued its Excise Tax Bulletin 504.08.192 outlining procedures to implement WAC 458-12-192 and to provide additional explanation of certain provisions of that administrative rule. The Bulletin requires licensed retailers of the Tribe to register with the State (without payment of registration fee) and to keep certain records documenting the tax-exempt status of sales to members of the Tribe. The following records are required of all retailers, including licensed retailers of the Tribe: (a) name of the Indian purchaser; (b) the tribal affiliation of the purchaser; (c) the Indian reservation to which or within which delivery was made, or within which retail services were rendered; (d) the dollar amount of the sale; and (e) the date of the sale (*id.* at 184-185). Finally, in the event unstamped cigarettes and tobacco products continue to be sold by licensed Indian retailers to non-members without the affixing of tax stamps and collection of sales tax, the State threatens to seize unstamped cigarettes and tobacco products in the possession of the Yakima Indian retailer (*id.* at 183).

The State has also threatened to seize cigarettes owned by, or consigned to, the Yakima Nation outside the boundaries of the Yakima Reservation. It presently relies upon a statute which declares contraband untaxed cigarettes found within the State in the hands of those not entitled to possess them. Wash. Rev. Code Ann. §82.24.250 (West 1964). Although Indian tribes are entitled to possess untaxed cigarettes, (*ibid.*), the State contends that it has the power to revoke permission to Indian tribes to possess such cigarettes if tribal operations result in untaxed sales to non-Indians. Wash. Rev. Code. Ann. §82.24.130 (West 1964).

4. At the outset of this litigation, state officers seized shipments consigned to the Yakima Nation, under a tax warrant and levy procedure. On May 5, 1972, the State of Washington assessed a tax of $304,582.40 and a penalty of $304,582.40 plus interest against the Yakima Nation "by virtue of Chapters 82.04 through 82.32 R.C.W." (A. 140). A "Notice and Order" was served on at least six interstate common carriers, notifying them that the Tribe owed the State $650,333.88 and ordering them to deliver to the State any tribal property in their possession (*id.* at 140-141). Attached to the notice was a statement that "[t]he notice and order to withhold and deliver shall constitute a continuing levy on * * * property until the department [of revenue] shall issue its release of such levy." Pursuant to the "Notice and Order," a shipment of cigarettes being transported from the State of Idaho to the Yakima Nation Industrial Park by common carrier was seized by the State and sold at public auction (A. 141). As a result of seizures of unstamped cigarettes bound for the Yakima Indian Reservation, the Tribe ceased its tribal wholesaling enterprise in January 1973, for a period of ten months, until the issuance of a temporary restraining order in this cause on November 5, 1973, restraining the State from interfering in the conduct of the tribal cigarette enterprise (*id.* at 147).

The State now concedes that it cannot assert liability against the Yakima Nation for state cigarette taxes (A. 187).

5. As originally filed by the United States on July 18, 1973, the *Yakima* suit sought to restrain the State from taking action against the property and transactions of the Yakima Tribe. In particular, the request for injunctive relief was addressed to the State's seizure of cigarettes consigned to the Tribe from interstate common carriers (A. 143).

On July 19, 1973, the United States requested that a three-judge court be convened because the complaint sought injunctive relief against the enforcement of state

statutes on the ground of their unconstitutionality (A. 145). On July 20, 1973, District Judge Powell certified the necessity for a three-judge court because the prayer in the complaint asked for an injunction against the application of "the revenue laws of the State of Washington on the Yakima Indian Reservation as an unconstitutional interference of interstate commerce and deprivation of property without due process of law" (*id.* at 146).

On November 5, 1973, Judge Powell entered a temporary restraining order barring the State from acting to assess a tax on or seize cigarettes, tobacco products or their containers being shipped to the Yakima Nation in interstate commerce or distributed by the Tribe to its licensed retailers (A. 147). On April 24, 1974, the Confederated Bands and Tribes of the Yakima Indian Nation filed a complaint in intervention requesting, in addition to declaratory and injunctive relief, money damages for interference with the tribal enterprise (*id.* at 155). On September 6, 1974, a three-judge court entered a preliminary injunction restraining the State from taxing or seizing cigarettes being shipped to the Yakima Nation or distributed to its tribal retailers (*id.* at 156). On October 4, 1974, the United States filed an amended complaint, asserting that the suit was filed on behalf of licensed tribal retailers as well as the Yakima Nation, and challenging the amendment, on August 23, 1974, of Washington state sales tax regulations which removed the state sales tax exemption enjoyed by Indian retailers. The amended complaint requested declaratory and injunctive relief against state regulation and taxation of the activities of licensed Indian retailers as well as the Yakima Nation (*id.* at 158–165).

After consolidation of the *Yakima* case and the *Colville* case for hearing, the district court held the cases in abeyance pending this Court's disposition of *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463 (1976); and *Bryan* v. *Itasca County*, 426 U.S. 373 (1976). Following the decisions in those cases, the district court entered a single opinion (J.S. App. 1–65). In both cases, the court ruled that the three-judge court had been properly convened because Washington's application of state statutes authorizing seizure of property to tribally owned goods moving in interstate commerce raised substantial constitutional questions under the Interstate Commerce Clause (*id.* at 13–14, 47–51).

Turning to the merits, the court held that imposition of the state cigarette excise tax on sales taxed by the Tribes was an unlawful interference with tribal self-government and was preempted by the tribal ordinances (J.S. App. 34, 41, 52).[3] In the *Yakima* case, the court held that insofar as the state sales tax applied to on-reservation cigarette sales, it was preempted by the Yakima tribal ordinance (*id.* at 52–53). In other respects, however, the sales tax was upheld (*id.* at 53–58). In both cases, the court struck down the recordkeeping and reporting requirements imposed by state regulations as they relate to transactions held exempt from the substantive tax (*id.* at 29–30, 57–58). The court issued separate judgments implementing these conclusions (*id.* at 66–70, 71–74). In both cases, Circuit Judge Kilkenny dissented from the majority's ruling enjoining the imposition of Washington's cigarette and sales taxes on sales to non-Indians (*id.* at 59–65, 70, 74).

ARGUMENT

A. *INTRODUCTION AND SUMMARY*

These cases present one aspect of a recurring question vital to the future of the surviving American Indian Tribes: When, if at all, are on-Reservation activities or

[3] The court also concluded that the state tobacco products taxes constituted unlawful direct taxation of Indians because the taxes fell on the tribal retailer and not the consumer (*id.* at 23, 52). The State does not challenge this ruling.

transactions involving both Indians and non-Indians exempted from State regulation or taxation? It is no exaggeration to say that on the answer depends, in large measure, the fate of the present policy of restoring the tribes to self-sufficient, self-governing, status in our society. Nor is this consequence legally irrelevant. When the Congress, having undoubted power to do so, has fixed upon a policy in Indian affairs, it is surely not improper to seek a result that will not defeat the legislative objective. Yet, even so, we cannot ask the Court itself to fashion new arrangements. The issue must of course be resolved within the existing framework of fact and law.

History has restricted the scope of the argument. Thus, it is far too late in the day to speak of an Indian Reservation as a sealed enclave, wholly separate from the State in which it is located. Because Reservations have long since been penetrated by non-Indians and, in many cases, the resident population is no longer confined to tribal members, the legitimate interest of the State in some activities there has been recognized. But it does not follow that Reservation boundaries are today no obstacle to State jurisdiction, nor that subsisting tribal sovereignty is no longer in any sense territorial. The fact is that *both* the tribe and the State often have different, and sometimes competing, interests over events occurring within a Reservation and no all-or-nothing solution will serve. Here, as elsewhere, the rule must be "adjustment and accommodation" (*Washington* v. *Fishing Vessel Ass'n*, Nos. 77-983, 78-119 and 78-139 (July 2, 1979), slip op. 22).

The question remains how such an apportionment of jurisdiction within a Reservation shall be made. It is suggested that, in the area of taxation, the dividing line is simply that the tribe may tax its own members while the State may tax all others, so that the validity of a State tax, even as it reaches transactions on a Reservation, is simply determined according as the "legal incidence" falls on Indians or non-Indians. This, it is argued, is settled, as to the exemption in favor of Indians or Indian property within a Reservation, by *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973), *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463 (1976), and *Bryan* v. *Itasca County*, 426 U.S. 373 (1976), and, as to State power to tax sales to non-Indians on a Reservation when they bear the legal burden, by the final holding of *Moe*, *supra*, 425 U.S. at 481-483. And, for the proposition that tribes may not tax non-Indians, appellants invoke *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), where the Court held the tribe without jurisdiction to punish non-Indians committing offenses against tribal members on the Port Madison Reservation.

There is, of course, no such bright line. Nor can there be. Total reliance on a "legal incidence" test would lead to very arbitrary results, wholly at odds with the considerations that ought to determine whether State or tribal interests are paramount. Thus, here, the State concedes that its tobacco products tax cannot be imposed on Reservation transactions to non-Indians because the district court concluded (J.S. App. 23 n.15) that its incidence fell upon the Indian Dealer (Wash. Br. 55 n.40), although, in part at least, the tax is otherwise indistinguishable from that imposed on cigarettes. So, also, undue deference to State characterization invites contrived rationalizations, as the present case illustrates. Indeed, while the burden of Washington's cigarette tax normally falls on the seller—which in the present context would render it invalid—the district court felt itself bound here to accept an exceptional rule to the effect that, uniquely in sales by Indians to non-Indians, the incidence of the tax falls on the purchaser (J.S. App. 20-24).

This Court has never followed such a mechanistic approach in deciding whether State intervention in Reservation affairs ought to be condoned. Neither by accident, nor by design, can a State so easily invade a domain still reserved for tribal regulation. We put to one

side instances in which there is an obvious "conflict with the federal enactments." (*United States* v. *McGowan*, 302 U.S. 535, 539 (1938)). For the usual case in which State regulation or taxation directly reaches non-Indians within a Reservation but also touches tribal interests, the controlling principle was summarized two decades ago in *Williams* v. *Lee*, 358 U.S. 217, 220 (1959), and has since been reiterated without deviation: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." To this basic rule we need only add that State jurisdiction will also be defeated if it invades an area preempted by federal regulation, or tribal regulation authorized by federal law. See *Warren Trading Post* v. *Arizona Tax Comm'n*, 380 U.S. 685 (1965); *Fisher* v. *District Court*, 424 U.S. 382 (1976).

Needless to say, these precepts are not self-executing and their application in various factual contexts may produce differing results. Thus, for instance, it is not enough to notice that both this case and *Moe* involve the issue whether a State cigarette tax validly may be imposed on Reservation sales to non-Indians. For two principal reasons, we believe *Moe* does not control here.

First, in *Moe*, although imposition of the State tax deprived the Indian retailers of "[a] competitive advantage" (425 U.S. at 482), there was no finding—nor even any claim—that the Reservation "smoke shops" were thereby put out of business. In contrast, the court in the present case expressly found that the substantial transactional taxes imposed by Washington, when added to the tribal tax, would "destroy" the Indian enterprise.[4] Second, whereas in *Moe* only private Indian

[4] It is noteworthy that the court rejected the claim of exemption from sales taxes in respect of other Reservation businesses because it found insufficient evidence of a like impact on these tribal enterprises (J.S. App. 50–51, 54–55).

businessmen were significantly affected, here the Tribe itself is immediately deprived of essential governmental revenues, and its taxing and regulatory authority is effectively abrogated, if the State may, through its taxes, frustrate a Reservation enterprise.

In sum, in this case, unlike *Moe*, there is an *actual*, and not merely potential, conflict between two *incompatible* assertions of *governmental* power. Here there is no blinking the fact that the action of the State constitutes a serious and direct interference with tribal self-government and, at the same time, conflicts with the policy of federal law to encourage the self-sufficiency of Reservation tribes. In these circumstances, established precedents tell us the State law must give way.

2. The balance of our brief is devoted to demonstrating that the particular State taxes invalidated in the *Yakima* case were rightly held to infringe on the tribe's powers of self-government and to invade a domain preempted by or under authority of federal law.

a. With respect to the question of interference with tribal self-government, we stress that the tribe's retained powers embrace a measure of territorial jurisdiction over the Reservation. We examine the cases in this Court and conclude that, in appropriate circumstances, tribal authority may reach the activities of non-Indians within a Reservation when they importantly affect tribal interests, and that, when the tribe so exercises its powers, it may displace State jurisdiction. This is such an instance, we submit. In light of the tribe's involvement in the on-Reservation cigarette enterprise, its comprehensive regulation and taxing of cigarette transactions, and its dependence on the revenues thereby generated, the incompatible State taxes plainly interfere with tribal prerogatives.

b. This conclusion is buttressed, we believe, by considering the overriding federal policy protecting tribal authority within Reservations against undue State intrusion. We consider the relevant treaty and statutory

provisions that evidence this policy and conclude that they confirm, if need be, the power of the Yakima Nation to take the actions involved here and evidence a congressional intent that the exercise of such authority by the tribe shall preempt conflicting State regulation.

B. *INTERFERENCE WITH TRIBAL SELF-GOVERNMENT*

We submit the court below correctly held that, as applied to transactions in cigarettes on the Yakima Reservation, Washington's excise and sales taxes impermissibly interfere with the Tribe's right of self-government. In order to test this proposition, it is useful, first, to attempt to define, so far as is relevant to the case, the right which we say is here invaded. We will then notice how the challenged taxes affect its exercise.

1. This Court has recently affirmed that "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978). The implicit divestiture affects the freedom to alienate land to non-Indians, the prerogative to engage in foreign relations and the power to try non-Indians in tribal courts. *Id.* at 326. But "the powers of self-government" have not been surrendered. *Ibid.* To that extent, the Indian Tribes remain sovereign. *Id.* at 322-323.

What does that sovereignty embrace? We should not expect to find the full answer spelled out in federal legislation since the sovereignty of Indian tribes is the residuum of aboriginal independence, not the consequence of "any delegation to them of federal authority." *Id.* at 328. To be sure, Congress may restore at least some of the tribal powers lost when the tribes became "dependent" or may delegate to tribal governments some aspects of its own authority. See *Oliphant* v. *Suquamish Indian Tribe*, *supra*, 435 U.S. at 212;

United States v. *Mazurie*, 419 U.S. 544, 556-557 (1975). So, also, Congress has always been free to diminish, or even extinguish, tribal powers, and any such enactment must of course be noticed. But, except as the Indian Civil Rights Act makes applicable certain basic "constitutional" rules, the whole thrust of recent legislation has been to encourage the exercise of tribal self-government. See *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 62-72 (1978); *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 388-389 n.14. Indeed, as we shall have occasion to notice (*infra*, pages 31-34), several federal statutes confirm the continuing vitality of tribal sovereignty and revive lost or dormant powers. See *Fisher* v. *District Court*, *supra*, 424 U.S. at 390. For the most part, however, tribal powers exist quite independently of treaties or statutes recognizing them. *United States* v. *Wheeler*, *supra*, 435 U.S. at 327-328.

The sovereign character of Indian tribes cautions us not to confine our focus to the federal statute book. But it also tells us what *kinds* of powers tribes possess. Of course, tribes may determine their membership, enact rules of conduct for the members, and levy assessments against them, on pain of suspension or expulsion. So may any private club. And, like any chartered association or corporation, tribes may engage in commercial enterprises. Yet, Indian tribes "are a good deal more than 'private, voluntary organizations.'" *United States* v. *Mazurie*, *supra*, 419 U.S. at 557. Nor are they mere creatures of a superior sovereignty, like cities or counties or territories, exercising only delegated powers. *United States* v. *Wheeler*, *supra*, 435 U.S. at 319-322, 329. Indian tribes enjoy sovereignty in their own right, which carries with it immunity from suit, even as against States of the Union (*Puyallup Tribe* v. *Washington Game Department*, 433 U.S. 165, 172-173 (1977)), as well as a unique exemption from the restraints imposed on all other domestic sovereignties by the Constitution (see *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 56, 71). It must follow that, except

as surrendered or restricted by Act of Congress, the tribes possess all the usual *governmental* powers.

There is no reason to doubt that, subject only to federal supervision, the tribe may exercise over its members all the police powers that pertain to State governments. Thus, a tribe may establish legislative, executive and judicial organs. It can make laws and enforce them in its own courts. See, *e.g.*, *Fisher* v. *District Court*, *supra*; *United States* v. *Wheeler*, *supra*, 435 U.S. at 322; *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 55–56, 59–60, 62–66. It may regulate and license. It may provide all usual governmental services and dispense welfare benefits. To raise necessary revenues, the tribe may itself administer tribal resources or, through lease or license, permit others to do so. And it may impose and collect taxes.

2. What is more, as in the case with all sovereigns, the powers of Indian tribes are, in important aspects, *territorial*.

With respect to some matters, Congress has imposed federal control or permitted the State to assume jurisdiction within Indian Reservations. *E.g.*, 18 U.S.C. 1152–1153, 1162; 25 U.S.C. 1321–1322. But, otherwise, the general rule is that "the Indians on it [are] largely free to run the reservation and its affairs." *Warren Trading Post Co.* v. *Arizona State Tax Comm'n*, *supra*, 380 U.S. at 690. Whether, in any particular instance, the authority of a tribe over its territory is a residue of aboriginal sovereignty or derives more immediately from federal treaties and statutes, it may not be necessary to decide. See, generally, *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, 411 U.S. at 168–173. What matters is that, even today, Reservation boundaries define an area within which the tribe has special prerogatives and which the State cannot enter except by leave of Congress or for very limited purposes.

Even when only members are involved, tribal authority, or the power of enforcement, sometimes depends upon whether the Reservation is the situs of the subject property or activity, or whether the parties reside there. See, *e.g.*, *DeCoteau* v. *District County Court*, 420 U.S. 425, 427 n. 2 (1975). *Fisher* v. *District Court*, *supra*, 424 U.S. at 389 & n.14. And State jurisidiction over Indians likewise usually turns upon their being outside "Indian country." Compare *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, with *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973). But the tribe's authority with respect to events occurring on the Reservation is not restricted to members. At least insofar as the welfare of the tribe is directly affected, tribal power extends to prohibiting or regulating activities within the boundaries of the Reservation.

This is, indeed, the teaching of the landmark case of *Williams* v. *Lee*, *supra*. When the Court there spoke of "the right of reservation Indians to make their own laws and be ruled by them" (358 U.S. at 220), and "the right of the Indians to govern themselves" (*id.* at 223), it was in no restrictive sense. These passages occur in the context of a holding that tribal courts, rather than the courts of the State, had exclusive jurisdiction of a civil dispute between an Indian and a non-Indian trader. As this Court said (*ibid.*):

> It was immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. * * * The cases in this Court have consistently guarded the authority of Indian governments over their reservations.

Nor does *Williams* v. *Lee* stand alone. It is instructive to notice first those very few situations in which, absent a controlling Act of Congress, the Court has condoned the application of State law within a Reservation. One series of cases involved the murder of one non-Indian by another. *United States* v. *McBratney*, 104 U.S. 621 (1881); *Draper* v. *United States*, 164 U.S. 240 (1896); *New York ex rel. Ray* v. *Martin*, 326 U.S. 496 (1946). As the last of them makes clear, the

rationale of these decisions is that such crimes, "which happened to take place upon an Indian reservation, * * * did not directly affect the Indians." 326 U.S. at 501. See, also, *id.* at 500. So, also, in the few cases upholding State or territorial taxes imposed on non-Indian property located within a Reservation, the Court has stressed that the effect on the tribe was either wholly absent (*Utah & Northern Ry.* v. *Fisher*, 116 U.S. 28, 31-32 (1885); *Maricopa & Phoenix R.R.* v. *Arizona*, 156 U.S. 347, 351 (1895)) or could be dismissed as "too remote and indirect" (*Thomas* v. *Gay*, 169 U.S. 264, 273, 275 (1898)) or as a "minimal burden" (*Moe* v. *Salish & Kootenai Tribes*, *supra*, 425 U.S. at, 483).

These exceptions in favor of State jurisdiction have been described as "quite limited." *DeCoteau* v. *District County Court*, *supra*, 420 U.S. at 427 n.2. They adjust the usual rule "to take account of the State's legitimate interests in regulating the affairs of non-Indians," but only "up to the point where tribal self-government would be affected." *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, 411 U.S. at 171, 179. Most recently, this Court restated the prevailing rule: absent a congressional cession of jurisdiction, "state law reaches within the exterior boundaries of an Indian reservation only if it would not infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'" *Washington* v. *Yakima Indian Nation*, No. 77-388 (Jan. 16, 1979), slip op. 6. It would be wholly wrong to fashion out of these exceptions a general principle that non-Indians on a Reservation are always subject to exclusive State authority even when their activities importantly affect tribal interests. On the contrary, as this Court summarized the matter in *McClanahan*, *supra*, 411 U.S. at 179, "cases applying the *Williams* test have dealt principally with situations involving non-Indians" in which "both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions," and, of course, *Williams* v.

Lee itself sufficiently shows that such a conflict is resolved in favor of the tribe when the welfare of the Indians is significantly implicated. See, also *Warren Trading Post* v. *Arizona Tax Comm'n*, *supra*, 380 U.S. at 686-687, 690, as explained in *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, 411 U.S. at 170 & n.6.

This view was recently confirmed in a case upholding tribal power to regulate the sale of intoxicants by a non-Indian within "Indian country." *United States* v. *Mazurie*, *supra*. In sustaining the tribe's authority over a non-Indian, the Court noted that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members *and their territory*" (*id.* at 557; emphasis added) and reproduced the passage just quoted from *Williams* v. *Lee* (*id.* at 558). To be sure, the Court has disapproved an attempt by a Tribe to assert *criminal* jurisdiction over a non-Indian. *Oliphant* v. *Suquamish Indian Tribe*, *supra*. But that decision may be taken as announcing an exception, not the rule. Indeed, since *Oliphant*, the Court has expressly re-affirmed *Williams* v. *Lee* (*e.g.*, *United States* v. *Wheeler*, 435 U.S. 313, 324 (1978); *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 56, 59, 65-66)), specifically noting its application to Reservation transactions involving non-Indians (436 U.S. at 65-66).

3. This understanding is relevant to answering the question whether State action interferes with the tribal right of self-government. Because the tribes are not private associations, but sovereigns wielding governmental powers, and because, with only limited exceptions, their authority is territorial as well as personal, it is not enough to ask if the intervention of the State disturbs some aspect of the "internal" relations between one member and another. The teaching of *Williams* and *Mazurie* is that relations between Indian and non-Indians on the Reservation are also within "the authority of Indian governments." What is more, the

intrusion of State law must be judged not only by its direct affect on tribal members as individuals, but according as it may impair the tribe's ability to raise revenues to accomplish governmental functions, may prejudice the status of tribal institutions, or may diminish the tribe's authority over its territory.

So viewed, it is plain that the right of the Yakima Nation to exercise the powers of government within the Yakima Reservation is adversely affected by the State taxes on cigarette transactions occurring there. Indeed, significant interference can be identified in at least three respects.

a. First, the State taxes purport to reach events which occur wholly on the Reservation. Washington is not taxing a use within the State, but outside the Reservation. Both the cigarette excise tax and the sales tax attach at the moment of purchase by a non-Indian and apply even if the cigarettes never leave Indian country. Permanent or temporary residents of the Reservation who consume the cigarettes there are subject to the exactions unless they are members of the tribe. In effect, except for tribal members, the Reservation boundary is ignored as an irrelevancy.

This, in itself, is a serious challenge to the territorial integrity of the Reservation and to the tribe's authority there. Just as tribes are not the State's creatures and enjoy sovereign prerogatives that derive from an independent source (*United States* v. *Wheeler*, *supra*), so, also, their Reservations are not part of the State in the same sense as cities or other State political subdivisions. State jurisdiction does not automatically attach to Indian country. For most purposes today, not only the United States, but also the affected tribe, must consent. 25 U.S.C. 1321-1326. To be sure, in special circumstances, State law may cross into Indian country without express authorization. But that is only when the State interest is, relatively, so much more substantial as to outweigh any adverse affect on tribal prerogatives. That is not the case here.

Of course, the State, for practical reasons, wishes to put the burden of collecting its cigarette and sales taxes on the Indian seller. Cf. *National Geographic* v. *Cal. Equalization Bd.*, 430 U.S. 551, 555 (1977). But such an interest would not justify the challenged scheme if the Reservation were assimilated to a neighboring State. Washington could not require Oregon sellers having no presence in the former State to pre-collect taxes imposed on the consumption of imported goods. *Id.* at 558-559. Much less could Washington purport to tax the sales elsewhere of goods that never entered the State. Moreover, it is doubtful if Washington could fail to give credit for the transactional tax already paid to the State of sale. See *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 331 (1977); *Japan Line, Ltd.* v. *County of Los Angeles*, No. 77-1378 (Apr. 30, 1979), slip op. 12. In the interstate context, Washington presumably would be held to be impermissibly attempting to appropriate "tax resources properly belonging to the state where the event occurs." *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 343 (1954). While the same inhibitions may not be fully applicable here, the analogy at least suggests how we should resolve the present conflict between two incompatible claims to taxing jurisdiction.

b. Application of the challenged taxes to on-Reservation transactions trespasses on the tribe's legitimate claim of limited territorial sovereignty. But that is not all. The intrusion of State law in this case directly impinges on tribal governmental functions. By legislative decision, the tribe regulates and taxes the sale of cigarettes within the Reservation. The superimposition of the State taxes on the same transactions effectively nullifies the tribal scheme. The practical consequence is that, in this respect, the tribe's governmental authority is destroyed. Obviously, the interference here is far more serious, and more intimately implicates tribal prerogatives, than the jurisdictional question which courts should try a private civil dispute arising

on the Reservation. Accordingly, this case seems a fortiori from *Williams* v. *Lee*.

c. Finally, the State taxes strike deeply at the tribe's capacity to raise essential governmental revenues. All government, of course, costs money, and independent government requires independent revenues. Like most tribes, the Yakima Nation cannot raise the funds necessary to carry on effective government without tribally operated or licensed enterprises that cater primarily to non-Indians, and the economic viability of most such businesses depends upon at least some exemption from State taxes.

The immunity which members enjoy in their dealings with each other is of little help in providing tribal revenues. Tribal self-sufficiency can be achieved only by trade, or other transactions, with more affluent non-Indian neighbors, including those residing on the Reservation. This may not justify exempting off-Reservation activities. See *Mescalero Apache Tribe* v. *Jones*, *supra*. But it is not immediately apparent why the tribes should not be free of the disabling burden of State taxation for what occurs within their own territory. Unless such an exemption is recognized, it is, for many tribes, little more than idle talk to speak of "self-government," or "self-determination," or "self-sufficiency." To deprive the tribes of their ability to raise revenue—otherwise than by alienating depleting tribal assets—is the surest means to destroying autonomous Indian governments.

C. *FEDERAL PREEMPTION*

We have assumed that, so far as it subsists, the right of the Yakima Nation to govern within its diminished territory free of State interference is not a privilege conferred by federal law, but, rather, the residuum of aboriginal sovereignty—the role of treaties and statutes being primarily to limit, territorially or otherwise, the extent of tribal autonomy. That appears to be the

teaching of *United States* v. *Wheeler*, *supra*, and seems to be implied by many other statements in this Court.[5] This approach is, moreover, consistent with the Court's tradition of treating interference with the right of tribal self-government as an independent ground for excluding the application of State law, separate from a conflict with federal legislation. *E.g.*, *Kake Village* v. *Egan*, 369 U.S. 60, 75 (1962); *Mescalero Apache Tribe*, *supra*, 411 U.S. at 148; *McClanahan*, *supra*, 411 U.S. at 179–180; *Moe*, *supra*, 425 U.S. at 483.

Even here, of course, one can speak of "preemption." The analysis is simply that the Constitution itself—as exemplified in the Indian Commerce Clause—ousts State jurisdiction over all matters within Indian Reservations that significantly touch tribal interests and reserves that area for federal regulation. This is, in effect, the approach of *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 540 (1832), as "modified" in *Wil-*

[5] Illustrative passages include the following: "[*A*]*bsent governing Acts of Congress*, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them" (*Williams* v. *Lee*, *supra*, 358 U.S. at 220; emphasis added); "If this power [of Indian governments over their reservations] is to be taken away from them, it is for Congress to do it " (*id.* at 223); "in the special area of state taxation, *absent cession of jurisdiction or other federal statutes permitting it*, there has been *no satisfactory authority* for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation" (*Mescalero Apache Tribe* v. *Jones*, *supra*, 411 U.S. at 148, (emphasis added), quoted in *Moe* v. *Salish & Kootenai Tribes*, *supra*, 425 U.S. at 475–476, and *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 376); and "[N]o federal statute sanctions this interference with tribal self-government" (*Fisher* v. *District Court*, *supra*, 424 U.S. at 388).

So, also, in more recent cases, the Court has made clear that *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, announces a general rule which does not turn on particular treaty or Enabling Act provisions. See *Mescalero Apache Tribe*, *supra*, 411 U.S. at 148; *Moe*, *supra*, 425 U.S. at 477; *Bryan*, *supra*, 426 U.S. at 375–377 & n.2.

liams v. *Lee*, *supra*, 358 U.S. at 219. Or, more modestly, it can be said that State law is pre-empted when the tribe, acting within the sphere of its residual sovereignty, has "occupied the field." Cf. *Fisher* v. *District Court*, *supra*, 424 U.S. at 390. In neither case, however, is it strictly necessary to invoke "particular treaties and specific federal statutes"(*Mescalero Apache Tribe*, *supra*, 411 U.S. at 148). Rather, the doctrine has been described as deriving from "a general pre-emption analysis" that builds on broad principles of allocation of powers and duties with respect to Indians as between federal and State authority. See *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 376 n.2.[6]

Thus far, as petitioners have noted, objections to State action based on "interference with tribal self-government" and "federal preemption" may be no more than two formulations of the same challenge. This overlap is especially likely to be assumed when, as here, the tribe is actively exercising its powers in a way that leaves no room for State intervention. But, in our view, the present case also involves a separate claim of preemption, premised on more specific sources of federal law. Indeed, as this Court has remarked, that is the usual situation. *McClanahan*, *supra*, 411 U.S. at 172 n.8.

Before turning to the relevant treaty and statutory provisions, however, we note the limited purpose for which they are invoked. There is no claim here of an explicit direct conflict between federal and State law. The immediate confrontation is with a tribal ordinance. We have argued that, since the tribe was acting within its reserved powers, this alone precluded incompatible State action. But it is an additional reason for holding

[6]To this extent, it would seem that *Bryan* and *Wheeler* have qualified the suggestion in *Moe* (425 U.S. at 481 n.17) that "existing federal statutes," rather than the Constitution, are inevitably the immediate source of a valid preemption claim in Indian matters.

the State's interference preempted if the tribal action "implements an overriding federal policy." *Fisher*, *supra*, 424 U.S. at 390. Accordingly, we undertake a brief examination of the federal treaty and statutory provisions that bear on the situation of the Yakima Nation and its Reservation.

1. The status of the Yakima Indian Nation has very recently come to the Court's notice. See *Washington* v. *Yakima Indian Nation*, *supra*. Formal recognition of the confederated bands and tribes as a governmental unit dates from 1855 when the United States signed a treaty with representatives of some 14 tribes who ceded most of their lands, reserved a tract of more than one million acres for their "exclusive use and benefit," and agreed to be considered "as one nation," with a single "head chief." Slip op. 5; Treaty with the Yakimas, Preamble, Arts. II and V, 12 Stat. 951, 952, 953. Although the tribes "acknowledge[d] their dependence upon the government of the United States" and relinquished the prerogative of conducting foreign affairs (Art. VIII, 12 Stat. 954), the treaty assumed the Yakima Nation's continuing domestic sovereignty over its reserved lands, from which all white men were excluded except Indian agents and those admitted by permission of the tribes. Art. II, 12 Stat. 952.

It is thus clear that the Yakima Nation, no less than the Navajo Tribe involved in *Williams* v. *Lee*, *Warren Trading Post* and *McClanahan*, early was recognized as enjoying the usual "authority of Indian governments over their reservations." *Williams* v. *Lee*, *supra*, 358 U.S. at 223. Their territory was "set apart" and, subject only to federal approval, the tribe was expressly empowered to exclude non-Indians or to admit them on conditions. See *Morris* v. *Hitchcock*, 194 U.S. 384 (1904). That this was a matter of importance to the Yakimas has been noted in this Court: "They feared the encroachments of the white man. Their fears were allayed by adapting the treaty to their understanding, by delineating the land they conveyed and the land they

reserved by great and commanding objects." *Northern Pacific Ry.* v. *United States*, 227 U.S. 355, 361 (1913). The territorial integrity of the Reservation was, moreover, protected by the already enacted Non-Intercourse Act, 25 U.S.C. 177 and the Indian Traders Act, 25 U.S.C. 261 *et seq.* In sum, as of 1855, the Yakima Reservation was confirmed as more "separate" than any State of the Union and subject to no outside authority except the limited supervision of the federal government.

The question, then, is whether anything occurring since 1859 when the Yakima Treaty was ratified has relevantly diminished the tribe's powers within its territory. Plainly, there has been no voluntary abandonment of tribal autonomy. As this Court recently noted, "[s]ince [1859], the Yakima Nation has without interruption maintained its tribal identity"; as late as 1953, it was one of the few tribes considered to have a " 'tribal law-and-order organization that functions in a reasonably satisfactory manner' "; and the Yakima Nation "has consistently contested the wisdom and the legality of attempts by the State to exercise jurisdiction over its Reservation lands." *Washington* v. *Yakima Indian Nation*, *supra*, slip op. 5, 12 n.19, 25-26 n.33. If tribal sovereignty has been diminished, it must be at the hands of the Congress.

2. Just before the turn of the century, two events of potential legal significance occurred. The first was the opening up of the Yakima Reservation, like many others, to non-Indians. In part, at least, this resulted from the allotment of substantial portions of the tribal lands to individual members pursuant to the General Allotment Act of February 8, 1887, ch. 119, 24 Stat. 388 (see *United States* v. *Sutton*, 215 U.S. 291, 292 (1909)), and the subsequent alienation of some of these tracts, together with some of the remaining "surplus lands" (see Act of December 21, 1904, ch. 22, 33 Stat. 595), into other hands. The result is that, today, some 20% of the Reservation acreage is held in fee, primarily by

non-Indians, and the permanent population includes more non-Indians than Indians. *Washington* v. *Yakima Indian Nation*, *supra*, slip op. 5-6. But, as this Court has firmly settled, neither the provisions of the Allotment Act, nor the fact of non-Indian ownership, removes such tracts from the boundaries of the Reservation or subjects them to State law. *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *United States* v. *Mazurie*, *supra*; *Mattz* v. *Arnett*, 412 U.S. 481 (1973); *Moe* v. *Salish & Kootenai Tribes*, *supra*.

We turn to the other occurrence, the admission of Washington as a State in 1889. Since even Indian Reservations created after statehood by Executive Order are generally exempted from State law (*e.g.*, *Donnelly* v. *United States*, 228 U.S. 243, 255-259, 268-272 (1913); *Arizona* v. *California*, 373 U.S. 546, 597-598 (1963)), it is plain the admission of a territory to statehood cannot change the status of a Reservation already "set apart" by solemn treaty. Here, however, we have an affirmative declaration by Congress that the separateness of existing Reservations in the new State shall be preserved, and that is a circumstance which this Court has stressed in justifying federal jurisdiction or applying the preemption doctrine. See, *e.g.*, *United States* v. *Sutton*, *supra*, 215 U.S. at 295; *United States* v. *Sandoval*, 231 U.S. 28, 36-38 (1913); *United States* v. *Chavez*, 290 U.S. 357, 360 (1933); *Williams* v. *United States*, 327 U.S. 711, 714-715 n.10 (1946); *Williams* v. *Lee*, *supra*, 358 U.S. at 222-223 & n.10; *Warren Trading Post* v. *Tax Comm'n*, *supra*, 380 U.S. at 687 n.3; *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, 411 U.S. at 178; *Fisher* v. *District Court*, *supra*, 424 U.S. at 386 & n.8.

In relevant part, the Enabling Act of February 22, 1889, ch. 180, 25 Stat. 676 (Wash. Br. 5a-6a), providing for the admission of Washington and three other states, required each of the new States to adopt at constitutional conventions "irrevocable ordinances" whereby

the people declared (Section 4 (Second), 25 Stat. 676–677):

> [T]hat they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; * * * that no taxes shall be imposed by the States on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said States from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation of said States so long and to such extent as such act of Congress may prescribe.

As required, identical provisions were made part of the Wash. Const. art. XXVI (J.S. App. 95).

Although Washington has at times argued otherwise, there remains no doubt that the effect of the Enabling Act is generally to preclude State jurisdiction, whether for criminal, civil or tax purposes, at least over trust and restricted lands within Indian Reservations. Identical provisions in the Arizona Enabling Act, ch. 130, 36 Stat. 569, and in this same statute as applied to Montana, have been so construed. *McClanahan*, *supra*, 411

U.S. at 178; *Fisher*, *supra*, 424 U.S. at 386 & n.8. And, most recently, the Court evidently indulged the same assumption with respect to the Reservation in suit. *Washington* v. *Yakima Indian Nation*, *supra*, slip op. 14–20.

To be sure, as the *Yakima* case holds, Section 6 of Pub. L. No. 280 (Wash. Br. 9a), when implemented by affirmative State legislation, effectively removed the bar of the Enabling Act to the State's assumption of jurisdiction to the extent there provided. Slip op. 14–29. But *Bryan* v. *Itasca County*, *supra*, makes clear that Public Law 280 did not intend to terminate tribal self-government and has no relevance to State taxing authority. See, also, *Yakima Indian Nation*, *supra*, slip op. 24–25 n.32. Indeed, here Washington apparently concedes that the application of Public Law 280 to the Yakima Reservation has no bearing on the question presented. The upshot is that the Washington Enabling Act remains in full force except with respect to the limited jurisdiction assumed under Pub. L. No. 280.

3. We turn, finally, to the substantial body of legislation that established an overriding federal policy of encouraging the tribes to regain a measure of political and economic independence, free of undue interference by outside authority.

a. As is familiar history, the first major step in that direction was the enactment in 1934 of the Indian Reorganization Act, ch. 576, 48 Stat. 984. Although the Yakima Nation—already having a functioning government—did not reorganize under that statute, its provisions remain important insofar as they define the bounds of tribal autonomy. Indeed, within a year, the Congress itself explicitly enacted that failure to reorganize under the Act should not prevent any tribe from enjoying the benefit of "[a]ll laws, general and special, and all treaty provisions affecting [its] reservation." Act of June 15, 1935, ch. 260, Section 4, 49 Stat. 378, 25 U.S.C. 478b. See, also, J.S. App. 33–34.

The Court has recently had occasion to review the history of the Indian Reorganization Act. *Mescalero Apache Tribe* v. *Jones*, *supra*, 411 U.S. at 151-152. See, also *Fisher* v. *District Court*, *supra*, 424 U.S. at 387, 390. In *Mescalero Apache Tribe*, it was ruled that the statute did not require exemption of an *off-reservation* tribal enterprise from State income taxes. But, at the same time, the Court noted the new congressional policy initiated by the Reorganization Act and, specifically, that "tribes were encouraged to revitalize their self-government" and to take control of their "business and economic affairs," while the territorial integrity of their Reservations was protected, *inter alia*, by "put[ting] a halt to the loss of tribal lands through allotment." 411 U. S. at 151. Each of these goals is of obvious relevance to our case.

We need add little to what was said in *Mescalero*. It is perhaps appropriate, however, to stress that the Indian Reorganization Act was more then a mere declaration of policy. Section 16, 25 U.S.C. 476, expressly authorized the adoption of constitutions vesting in the tribe or a tribal council "all powers" under "existing law," as well as certain additional prerogatives including authority "to negotiate with the Federal, State, and local Governments." The breadth of this provision is illustrated by the ruling in *Fisher*, where the Court held that Section 16 authorized a preemptive tribal ordinance governing adoption. 424 U.S. at 390. Nor are the powers embraced by Section 16 confined to members. In important respects, they are territorial. See *Powers of Indian Tribes*, 55 I.D.14 (1934), cited with approval in *United States* v. *Wheeler*, *supra*, 435 U.S. at 328. The express power to enter into intergovernmental "negotiations" is also suggestive: there is at least an implication that the tribes enjoy a degree of sovereignty over their own territory.

Other provisions of the Reorganization Act confirm this view. Restrictions on the alienation of allotments are extended indefinitely. Section 2, 25 U.S.C. 462.

Further allotment of Reservations is ended. Section 1, 25 U.S.C. 461. Surplus tribal lands may be withdrawn from sale or appropriation. Section 3, 25 U.S.C. 463. And the Secretary of the Interior is authorized to create new Reservations or to restore or add lands to existing Reservations. Sections 5 and 7, 25 U.S.C. 465 and 467. Plainly, this territorial emphasis reflects a Congressional determination to establish a "sheltered place," as well as an economic base, for the exercise of tribal autonomy.

Nor was economic development left to exhortation. Indian corporations were to be established at government expense (Sections 9 and 17, 25 U.S.C. 469 and 477) and substantial loans to them were authorized (Section 10, 25 U.S.C. 470). As this Court has noted, the intent was " 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism,' " and to provide the means for a tribe to engage in enterprises that would "generate substantial revenues for the education and * * * economic welfare of its people." *Mescalero Apache Tribe*, *supra*, 411 U.S. at 151, 152, in part quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934).

b. The policy of the Indian Reorganization Act became threatened two decades later when Congress reverted to an assimilationist approach, evidenced by Public Law 280 and several Termination Acts. See, generally, *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968). But the Reorganization Act was never repealed and, since the mid-1960's it has been supplemented by other legislation in the same vein.

We may note the enactment in 1966 of 28 U.S.C. 1362, 80 Stat. 880, expressly recognizing the capacity of Indian tribes to initiate litigation in their own behalf in federal courts, free of at least some of the impediments that would bar individuals. See *Moe*, *supra*, 425 U.S. at 468-469 n.7, 472-475. In 1968 Congress strengthened the control of the tribes over their reservations by pro-

hibiting further State assumptions of jurisdiction except with tribal consent. 25 U.S.C. 1321-1326, 82 Stat. 78 (Wash. Br. 13a-16a). See *Kennerly* v. *District Court*, 400 U.S. 423 (1971). The same Indian Civil Rights Act, while imposing certain restrictions on their exercise for the protection of individuals, expressly recognized broad "powers of self-government" in Indian tribes. 25 U.S.C. 1301(2), 1302, 1311. Indeed, in *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 62, this Court found that one goal of the Act was "to promote the well-established federal 'policy of furthering Indian self-government,' " and, partly on that ground, concluded that the individual rights there guaranteed must normally be vindicated in tribal courts. See, also, *id.* at 63-64.

c. Even more recently, in the Indian Financing Act of 1974, 25 U.S.C. 1451 *et seq.*, and the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450 *et seq.*, the Congress has confirmed its commitment to Indian self-determination, which includes the desire of "the Indian people * * * to control their relationships both among themselves and with non-Indian governments, organizations, and persons." 25 U.S.C. 450(a)(2). See *Bryan*, *supra*, 426 U.S. at 389 n.14. And, finally, there are a number of statutes which reflect a congressional decision to recognize Indian tribes as separate governmental units. *E.g.*, State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1227 (b)(4); Economic Opportunity Act of 1964, 42 U.S.C. 2790 (c) and (f); Solid Waste Disposal Act, 42 U.S.C. 6903(13); Housing and Urban Development Act of 1965, 42 U.S.C. 3106(b). See, also, Clean Air Act Amendments of 1977, Pub. L. No. 95-95, Section 164(c), and (e), 91 Stat 735, 42 U.S.C. 747(c) and (e); Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, Section 710, 91 Stat. 523, 30 U.S.C. 1300.

4. In rehearsing the provisions of federal law that bear on the present status of the Yakima Nation and its Reservation, we have attempted to obey the injunction

"to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power." *McClanahan*, *supra*, 411 U.S. at 172. But, as we noted at the outset, the object of the exercise was not to identify specific language expressly barring the particular State intrusion challenged in this case. That is no more necessary here than it was in *Williams*, or *Warren Trading Post*, or *McClanahan*, or *Moe*, or *Bryan*. With respect to activities confined within an Indian Reservation, there is no presumption that the State may exercise its usual police powers. Compare *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). On the contrary, here exclusion of State law is the normal rule: "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in [our] history." *Rice* v. *Olson*, 324 U.S. 786, 789 (1945). And any outside supervision of Reservation affairs is generally reserved to federal power. Accordingly, the State is presumptively out of bounds and a finding that its action is preempted does not require a direct conflict with federal enactments. Cf. *Hines* v. *Davidowitz*, 312 U.S. 52, 68 (1941); *Pennsylvania* v. *Nelson*, 350 U.S. 497, 504 (1956).

On this understanding, and read against the "backdrop" of the Indian sovereignty doctrine (*McClanahan*, *supra*, 411 U.S. at 172), the treaty and statutory provisions we have reviewed fully sustain the claim of preemption. Perhaps, as *Moe* suggests, they do not foreclose State taxation of sales to non-Indians when the tribal government is not significantly affected. But, in our view, it is impossible to read the Treaty with the Yakimas, the Washington Enabling Act, the Indian Reorganization Act, and the more recent statutes without concluding that the Congress has declared its intention to preempt interference with the *actual* exercise of Indian sovereignty of the kind involved here. Indeed, it would be imputing to Congress something of a cruel joke to read its legislation as en-

couraging this tribal experiment in self-help and, at the same time, to hold that it permits State action wholly defeating the enterprise. We prefer to assume a more serious congressional purpose. In our submission, the relevant provisions of treaty and statute announce an "overriding federal policy" which both authorizes tribes to undertake such activities within their Reservations and shields them against destructive State interference when they take up the invitation.

CONCLUSION

For the foregoing reasons, the judgment of the district court in the *Yakima* case should be affirmed.

Respectfully submitted.

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